

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Trial Branch

UNITED STATES OF AMERICA

v.

BRIAN GAITHER,

Defendant.

Case Number: 2011 CFI 1426

Judge: William M. Jackson

Status Hearing: February 27, 2013

2013 FEB 26 P 3:13

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

GOVERNMENT'S OPPOSITION TO DEFENDANT GAITHER'S
MOTION TO WITHDRAW GUILTY PLEA

The United States of America, by and through counsel, the United States Attorney for the District of Columbia, for the reasons stated below and for any reasons that may be stated at a hearing on the motion, and in reliance on the documents contained in the Government's attached Appendix,^{1/} hereby opposes Defendant Brian Gaither's Motion to Withdraw his Guilty Plea ("Motion to Withdraw"). The defendant's motion is without merit, and should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND^{2/}

On August 2, 2010, 18-year-old Latisha Frazier was kidnapped and murdered. On January 22, 2010, the defendant was arrested on an outstanding misdemeanor bench warrant, waived his rights, and, in an audio and video recorded interview, confessed to Frazier's murder. Specifically, defendant Gaither admitted to being a member of a group that lured Latisha Frazier over to 1787 Trenton Place S.E., Washington, D.C., with the intent to assault her in retribution for having stolen

^{1/} The appendix is being compiled and will be filed on or about February 25, 2013. Citations to "Tabs" refer to the appendix. The appendix contains all documents relied upon in support of this pleading that have not already been filed in the court record; documents filed in the public record are referred to by their title and the date they were filed.

^{2/} This factual summary, given upon information and belief, is not intended to be a full description of the government's evidence in this case. It is provided only in order to give the Court sufficient information to consider this pleading.

money from Johnnie Sweet. In his statement, the defendant admitted that he, as well as several other members of the group, punched and kicked the decedent. Gaither also admitted that, after the decedent had been duct taped around her arms, legs, and head, defendant Gaither then put the decedent in the “L,” a choke-hold (or “sleeper-hold”) maneuver that Gaither said was intended to make her light-headed and weak. According to Gaither, after he put the decedent in the “L,” the decedent was still coughing. Gaither said that Johnnie Sweet put the decedent in the closet and they all went about their “regular business.” When the two men checked on the decedent later that day, she was dead. Gaither also confessed to putting the decedent’s body in a large plastic “tote” and disposing of the decedent’s body by throwing the tote containing her remains in the dumpster behind 1787 Trenton Place, S.E.

Gaither was charged with the murder of Latisha Frazier, and was presented on January 24, 2011. The five other members of the conspiracy were also arrested and charged for their roles in the murder. All pled guilty before indictment except defendant Gaither and his co-defendant Johnnie Sweet.^{3/} On November 1, 2011, defendants Gaither and Sweet were indicted by a grand jury and charged with First Degree Felony Murder (Kidnapping), First Degree Premeditated Murder, and Tampering with Physical Evidence. Defendant Gaither was also charged with Obstruction of Justice for his attempts to procure false testimony on his behalf.^{4/} The indictment is attached (Exhibit 1). Both men were arraigned on November 3, 2011, and a joint trial date was set for November 19, 2012.

^{3/} Defendant Sweet is currently scheduled to proceed to trial before Judge Canan on April 22, 2013.

^{4/} Defendant Gaither provided a witness with a “script” full of false statements and instructed the witness to provide this false information to law enforcement.

Following his indictment, the government extended a plea offer to Defendant Gaither to one count of Second Degree Murder with Aggravating Circumstances pursuant to Rule 11(e)(1)(C), with an agreed upon range of 30 to 38 years of incarceration. On May 11, 2012, after being placed under oath, the Court conducted a detailed colloquy with defendant Gaither during which the plea offer, and the consequences for rejecting it, were explained to him. Defendant Gaither affirmed, under oath, that he understood and that he had decided to reject the government's plea offer.

In the months leading up to the trial date, defendant Gaither moved to sever his case from that of defendant Sweet, alleging that a joint trial with co-defendant Sweet would unfairly prejudice him. On July 19, 2012, the government withdrew its opposition to the severance motion and opted to try the two men separately, in successive trials.^{5/} The Court granted the government's request to first proceed to trial against defendant Gaither, upon whose motion the severance was granted. On August 31, 2012, defendant Gaither filed a motion requesting that the Court reconsider its ruling that Gaither proceed to trial first, effectively requesting a continued trial date that would have allowed defendant Gaither to gain the strategic advantage of previewing the government's evidence through the trial of defendant Sweet. This motion was denied by the Court.

With this motions denial, defendant Gaither made no secret of his plan to manipulate the legal system to what he perceived as his own benefit: having his case continued until January so that a different judge would preside over his trial.^{6/} Specifically, on September 2, 2012, the defendant

^{5/} The severance of the trials had the effect of, *inter alia*, allowing the government to play the full and unredacted confessions of each defendant at their respective trials.

^{6/} This Court's term on the "Felony 1" calendar ended in December 2012; in January
(continued...)

made the following statements in a recorded jail call:^{2/}

Gaither: I'm supposed to go to trial in November, right? But, we trying to get in front of a new judge. So, my lawyer is doing all these wild little re-schedulings right?

See Jail Call 2530066626906114 at 03:38. Four days later, on September 6, 2012, the defendant engaged in the following conversation:

Caller: Your trial next month right?

Gaither: Nah, my trial in November.

Caller: Oh, damn. Well, that ain't that far off. That's better than two years ago. Supposedly they give you time-served, if anything.

Gaither: [] I'm trying to get away from the judge I'm in front of. I'm trying to go to trial next year.

Caller: Oh okay.

Gaither: Yeah.

See Jail Call 253361851286530 at 08:22. Two days later, on September 8th, 2012, the defendant said:

Gaither: Yeah man, I go to court next Friday, so I'm trying to see whether we going to position ourselves – either we going to fall in front of a new judge or we'll have to fight in front of this [judge]. I'm praying we get a good position in front of the new judge and we can re-submit some of my motions that he hasn't answered and some that he has rejected, and hoping that, I can make it better. I'ma try to get the case thrown out.

See Jail Call 253538090424322 at 4:10. In the same call, minutes later, after the initial caller

^{6/}(...continued)

2013 Judge Johnson took over the calendar.

^{2/} All of the jail calls have been turned over to the defense in discovery.

connects an additional female caller on three-way, and the defendant repeats himself:

Caller: When did you say your trial is?

Gaither: In November.

Caller: Oh, you don't know the exact date?

Gaither: November 19th. We trying to get it pushed to next year so I can get in front of a new judge, but. . .

Caller: Huh?

Gaither: We trying to get it pushed back to next year, so I can get in front of a new judge.

See Jail Call 253538090424322 at 13:10.

Four days before trial, on November 15, 2012, the defense informed the government – for the first time – that they were going to move to continue to explore potential insanity issues. On Friday, November 16, 2012, the Court denied the defendant's motion to continue and informed the defendant that the trial would proceed as scheduled. Over the weekend before trial, the defense filed a motion to bifurcate the insanity and guilt phases of the trial, apparently asserting an insanity defense in the last moments before trial. The government opposed, and the Court denied the defendant's request.

On November 19, 2012, the parties proceeding with preliminary motions. All of the defendant's motions were denied, including his motion to suppress statements, thereby conclusively establishing the admission of his confession at trial. The Court informed the parties to plan to proceed to jury selection on the following Monday, November 26, 2012, after the Thanksgiving holiday weekend.

II. THE DEFENDANT'S GUILTY PLEA

During this time period, the parties continued what had been ongoing plea discussions concerning a possible disposition of this case.^{8/} Specifically, following the motions hearing, on November 19, 2012, the government extended the defendant a plea offer to one count of First Degree Felony Murder, with the government offering the defense two options concerning allocation under Rule 11(e)(1)(C): either an agreed-upon sentence of 32 years of incarceration or an agreed-upon sentence of a range between 30 to 33 years of incarceration.^{9/} That evening, at 10:02PM,^{10/} the defense informed the government and the Court by email of defendant Gaither's intention to accept a government plea offer to felony murder, in violation of D.C. Code § 22-2101, with an agreement pursuant to Rule 11(e)(1)(C) to 32 years' incarceration.

^{8/} The government would note that, although it was never able to reach a plea agreement with the defense prior to this time, throughout the life of this case, it had extensive discussions with defense counsel about the merits of the government's case against defendant Gaither and any potential dispositions of this matter.

^{9/} This was an improvement upon the last plea offer the government had made to the defendant, which exposed him to 38 years of incarceration. In exchange for his plea of guilty, the defendant avoided exposure to a sentence of life without possibility of release, a significant possibility given the strength of the government's case on the felony murder count and the presence of aggravating circumstances (that the murder occurred during the course of a kidnapping, and that it was atrocious, heinous, and cruel). The defendant also avoided exposure to a consecutive sentence for obstruction of justice for his attempts to procure false testimony on his behalf at his upcoming trial.

^{10/} The government understood that it would be receiving a late email from the defense; following the afternoon plea discussions, counsel explained that they would be spending the afternoon and evening at the D.C. Jail discussing this latest version of the plea with the defendant.

A. The Written Plea Agreement

The following day, November 21, 2012, the defendant formally accepted the plea offer by executing a plea agreement (Exhibit 3), trial waiver form (Exhibit 4), and factual proffer (Exhibit 5). The central terms of the agreement were that:

- the defendant agreed to plead guilty to first-degree felony murder, in violation of D.C. Code §§ 22-2101, as charged within the second count of the indictment;
- the government agreed to dismiss the greater and remaining charges in the indictment at the time of sentencing; and
- both parties agreed that the plea would be pursuant to Superior Court Rule of Criminal Procedure, 11(e)(1)(C), with an agreed upon sentence of 32 years of incarceration.

In executing the agreement, the defendant signed the following acceptance:

I have read this plea agreement and the attached factual proffer (or had it read to me) and have discussed it with my attorney, [PDS]. I fully understand this agreement and agree to it without reservation. I do this voluntarily and of my own free will, intending to be legally bound. No threats have been made to me nor am I under the influence of anything that could impede my ability to understand this agreement fully. I am pleading guilty because I am in fact guilty of the offenses set forth herein.

I reaffirm that absolutely no promises, agreements, understandings, or conditions have been made or entered into in connection with my decision to plead guilty except those set forth in this plea agreement. I am satisfied with the legal services provided by my attorney in connection with this plea agreement and matters related to it. (Exhibit 3 at 4.)

The defendant's then-counsel also signed the agreement, acknowledging the following: "I have read each of the four pages constituting this plea agreement, reviewed them with my client, Brian Gaither, and discussed the provisions of the agreement with my client, fully. These pages accurately and completely set forth the entire plea agreement." (Exhibit 3 at 4.)

In addition to signing the acknowledgment form on the plea agreement, the defendant also signed a “Superior Court of The District of Columbia Plea Agreement and Waiver of Trial” form (Exhibit 4). The waiver form states in boldface type and capital letters that, **“YOU ARE NOT REQUIRED TO PLEAD GUILTY,”** and then explains the “important rights” defendants who plead guilty give up, including the right to a jury trial, the presumption of innocence, the right to counsel, the right to testify or not, and the right to appeal. After explaining these rights, the form sets forth the following acknowledgment, which the defendant signed:

Your signature on this form means that you wish to plead guilty and give up your right to trial and your right to appeal. If the court accepts your guilty plea, you will be convicted and the only matter left in the case will be for the court to sentence you. No person can guarantee what your sentence will be.

I HAVE REVIEWED THIS FORM WITH MY LAWYER AND HAVE DECIDED TO PLEAD GUILTY IN THIS CASE. I HAVE DECIDED TO GIVE UP MY CONSTITUTIONAL RIGHT TO HAVE A TRIAL AND TO GIVE UP MY RIGHT OF APPEAL. (Exhibit 4; emphasis in original.)

Finally, the defendant (and his counsel) signed the Proffer of Facts (Exhibit 5), acknowledging the following:

I have read and discussed the government’s Proffer of Facts with my attorney, [PDS], Esquire. I agree, and acknowledge by my signature that this Proffer of Facts is true and correct.

In acknowledging the proffer of facts, the defendant also admitted that: “In entering this plea of guilty, defendant Brian Gaither admits these facts freely and voluntarily, without duress or coercion.” (Exhibit 5 at 2).

B. The Rule 11 Colloquy

After the defendant executed the above-described paperwork, it was provided to the Court, and the Court proceeded to conduct a change-of-plea hearing and colloquy under Rule 11.^{11/} Before any substantive issues were addressed, the defendant was placed under oath. The Court then explained the terms of the plea agreement to the defendant; that he would plead guilty to first-degree felony murder, that the government would dismiss all remaining counts, waive enhancement papers for aggravating circumstances that applied, and that no other charges would be brought against him relating to this incident (Plea Tr. 5). The Court highlighted that the parties had agreed to a sentence of 384 months (32 years) of incarceration and that is what the defendant's sentence would be if the Court accepted the agreement. Id. Then, the Court asked:

THE COURT: [D]o you understand?

DEFENDANT: Yes.

THE COURT: Is that your understanding of the agreement that's been reached between you and the Government?

DEFENDANT: Yes.

THE COURT: Other than that agreement, have there been any other agreements or promises that have been made to get you to plead guilty?

DEFENDANT: No.

(Plea Tr. 5-6.) After informing defendant of statutory maximum for felony murder, and noting that the statutory maximum could not be imposed if the plea was accepted, the Court asked:

^{11/} A transcript of the plea hearing is marked as Exhibit 2 in the appendix and is hereinafter cited as ("Plea Tr.")

THE COURT: Now, knowing that, do you still wish to enter a plea of guilty?

DEFENDANT: Yes.

(Plea Tr. 6). After asking a series of background questions of the defendant, the Court asked: "Is there anything else at all that would affect your ability to think clearly and understand what's going on here today?" The defendant replied: "No." (Id. at 7).

The government then read the entire Proffer of Facts, in which the defendant admitted that he punched, kicked, and stomped Latisha Frazier in the small bedroom of 1787 Trenton Place S.E. (Plea Tr. 9) The defendant admitted that, when Frazier was moaning in the closet, "[the defendant] went to the back bedroom, wrapped his arms around Frazier's neck, and choked her using a technique he described as the L sleeper hold. Gaither then put Frazier back inside the closet." Id. The defendant also admitted that, after it was discovered that Frazier had died, the defendant put the decedent's body inside a plastic container, which he threw in the dumpster behind 1787 Trenton Place S.E. Id. At the end, the government read: "In entering this plea of guilty, defendant Gaither admits these facts freely and voluntarily, without duress or coercion." The following colloquy then occurred:

THE COURT: All right. Mr. Gaither, did you heard what the government had to say?

DEFENDANT: Yes.

THE COURT: Is what the Government said true?

DEFENDANT: Yes.

THE COURT: I have here, on page 2 of the proffer of facts, it says here defendant's acknowledgment. And it says here, I have read and discussed the Government's proffer of facts that we just

talked about with my attorney, [PDS], Esquire. I agree and acknowledge by my signature that this proffer of facts is true and correct. And there it has your name there, Brian Gaither. Is that your signature right above there?

DEFENDANT: Yes.

THE COURT: Did you go through this with your attorney before you signed it?

DEFENDANT: Yes.

THE COURT: Was he able to answer any questions you might have had about it?

DEFENDANT: Yes.

(Plea Tr. 11).

The Court then discussed with defendant Gaither his rights in great detail, and specifically the rights he was giving up in pleading guilty. The Court informed the defendant that he did not have to plead guilty, and the defendant affirmed that he understood. (Plea Tr. 12). In response to the Court's questioning, the defendant affirmed that he understood that he had a right to a jury trial, that he was presumed innocent until the government proved him guilty beyond a reasonable doubt, and that he had a right to the assistance of a lawyer at that trial. (Plea Tr. 12). The defendant affirmed that he understood he would not have to present any evidence at the trial, but that he could call witnesses that would be forced to testify on his behalf. (Plea Tr. 13). The defendant affirmed that he understood he had the right to remain silent, that he would not have to testify at a trial, and that a jury would be instructed not to hold that against him if he decided not to testify. (Plea Tr. 13-14). The defendant was also informed that he had an absolute right to testify, if he so elected. The defendant affirmed that he understood (Plea Tr. 14). Finally, the defendant understood that he gave

up his right to appeal (Plea Tr. 15). The following colloquy then occurred:

THE COURT: Has anyone threatened, forced you, coerced you or made you enter a plea of guilty in this case?

DEFENDANT: No.

THE COURT: I take it then you are entering this plea of guilty because in fact you are guilty and you've thought about it, talked it over with your lawyers, and decided this is something you want to do. Is that right?

DEFENDANT: No.

THE COURT: You don't want to plead guilty?

DEFENDANT: I mean yeah, but I'm just asking a question.

THE COURT: As I said, I take it you're entering a plea of guilty because in fact you are guilty. Is that right?

DEFENDANT: Yeah. Yes.

THE COURT: Have you had enough time to talk about this case with your lawyer?

DEFENDANT: Yes.

THE COURT: Have you had enough time to talk about your decision to enter a plea of guilty today with your lawyer?

DEFENDANT: Yes.

THE COURT: Are you satisfied with your lawyers and what they've done for you?

DEFENDANT: No.

THE COURT: You're not satisfied with your lawyers?

DEFENDANT: No.

THE COURT: What is it you're not satisfied with?

DEFENDANT: In the beginning it was things that could have been done, but it wasn't. I feel like it was unfair to me. You know, evaluations, other motions that could have been filed way before. It was just – that's where I'm at.

THE COURT: All right. We need to set this down for trial because he doesn't want to —

COUNSEL: I don't think that's what Mr. Gaither was saying. But if I could have the Court's indulgence.

THE COURT: Sure.

[...]

COUNSEL: Your Honor, we're ready to proceed.

THE COURT: Mr. Gaither, I asked if you were satisfied with the services of your attorney, and your answer was no. And I really want to explore that. You said that you wanted more, that certain motions should have been filed earlier and the like, and evaluations. And I really want to understand that. I know we took a break, and you had an opportunity to speak with your lawyers in the back. So that's where I'm at. I'm trying to find out if you're satisfied with your lawyers and what they've done.

DEFENDANT: Yes.

THE COURT: Well, I just really want to – I can't hear you. I'm sorry.

DEFENDANT: Yes.

THE COURT: Is there something that you're dissatisfied with them about?

DEFENDANT: Except for what I told you.

THE COURT: Okay. Well, I'm trying to – I don't know where that leaves us, Mr. Gaither. There have been a ton of motions that have been filed in this particular case on your behalf by your lawyers. Is there some other motion that you believe should have been filed that they haven't filed?

DEFENDANT: I'm not sure, but I know there could have been.

THE COURT: I'm trying to figure out what motion you believe should have been filed.

DEFENDANT: I don't know.

THE COURT: Pardon?

DEFENDANT: I don't know the law.

THE COURT: [Counsel]?

COUNSEL: You're Honor, we're satisfied. I think that perhaps if the Court reframed the same question with presently satisfied with our advice, that that would get us over this hump.

THE COURT: I don't want this to come back later on.

GOVERNMENT: Your Honor, what the Government would ask is that, obviously with the plea of guilty, Mr. Gaither gives up the right to appeal, and also to assert a defense, those defenses including the insanity defense. So we were going to ask for a separate inquiry with respect to that, just as simple as that. And after that I believe the Government will be satisfied if we ask Mr. Gaither if he's presently satisfied with his counsel.

THE COURT: Are you presently satisfied with your counsel?

DEFENDANT: Yes.

THE COURT: And the advice that they've given you?

DEFENDANT: Yes.

THE COURT: And the work that they've done?

DEFENDANT: Yes.

(Plea Tr. 16-19).^{12/} The Court then moved to the defendant's waiver of trial form. The defendant affirmed that he had signed the waiver of trial form, that he went through the form with his lawyers before he signed it, and that – by signing it – he understood that he was giving up his right to a trial. The following colloquy then occurred:

THE COURT: Finally, Mr. Gaither, do you have any questions for the court about anything that has gone on so far? Now, before you answer that, let me say this. **If I accept your plea of guilty, it's going to be very, very difficult for you to come back here next week or next month or next year and say, I've changed my mind, I really didn't want to plead guilty. So if there's anything that's not clear to you, anything confusing to you, you need to let me know. If there's any hesitation or reluctance about doing this, you need to let me know now.** And if you have any questions for your lawyer, you're free to ask them of him now, before we go forward. Any question for the Court?

DEFENDANT: No.

(Plea Tr. 20-21) (emphasis added).

At the request of the government, the Court also inquired of the defendant whether he understood that, by pleading guilty, that he was also waiving any right to assert the insanity defense. The defendant affirmed that he understood. The Court explained the insanity defense, and the defendant affirmed that he understood again. The defendant affirmed that he wished to waive his right to raise an insanity defense. (Plea Tr. 22).

Finally, the Court inquired as to the defendant's ultimate desire to plead guilty, as follows:

^{12/} The government would note that, despite defendant Gaither's plain ability and willingness to interject himself into the proceedings as necessary, at *no point* did he express any hesitation or reservations about either his factual guilt or his desire to accept the guilty plea. Additionally, at *no point* did Gaither express any indication that he was confused or that he felt pressured in taking the plea.

THE COURT: Then, Mr. Gaither, to the charge of first degree felony murder, how do you plead: guilty or not guilty?

DEFENDANT: Guilty.

(Plea Tr. 22). The Court found that the defendant understood his guilty plea and the plea agreement, that he was aware of his rights, which he had knowingly, intelligently, and voluntarily waived. The Court also found that there was a factual basis for the plea. The Court therefore accepted the defendant's guilty plea, conditionally, pursuant to Rule 11(e)(1)(C). (Plea Tr. 23). Sentencing was scheduled for February 1, 2013.

C. Defendant's Motion to Withdraw

On December 30, 2012, the defendant wrote a letter to the Court, addressing "th[e] plea I took last month." See Defendant Gaither's Letter of Dec. 30, 2012. The defendant told the Court that he was "willing to take back the plea" and go to trial, that he accepted the plea "out of anger and frustration," and that it was "forced and came as a last option to me." Id. The defendant told the Court that he "always wanted to go to trial in front of you and I'm asking to go to trial. . . with new counsel to advise me. . ." Id. At a hearing on January 10, 2013, the Court appointed new counsel to speak with the defendant to advise him with regards to his letter. On January 30, 2013, new counsel filed the instant motion to withdraw the defendant's guilty plea. At a status hearing on February 1, 2013, because the defendant's Motion to Withdraw contained allegations creating a potential or actual conflict of interest, the Court permitted the defendant's then-counsel, the Public Defender's Service (PDS), to withdraw from their representation of defendant Gaither. A hearing on the defendant's Motion to Withdraw was scheduled for February 27, 2013.

III. ARGUMENT

Defendant Gaither's Motion to Withdraw is without merit and should be denied without a hearing. The defendant's motion was made more than a month after he entered his guilty plea and under circumstances that suggest he is again attempting to manipulate the system to his own ends. The assertions in his motion are undercut and, in some cases, flatly contradicted by the record in the case, including by his own statements during the Rule 11 colloquy. And rather than assert his innocence, the defendant's motion only serves to make clear that he is unquestionably and unequivocally guilty of the first degree felony murder of Latisha Frazier. Accordingly, the Court should deny defendant Gaither's Motion to Withdraw.

A. APPLICABLE LEGAL STANDARDS AND PRINCIPLES

Withdrawal of a guilty plea is not a matter of right. See Shepard v. United States, 363 A.2d 291, 294 (D.C. 1976) ("The offer of a plea is a solemn act which may not be rescinded following conviction except upon a strong showing that the interests of justice demand that the judgment be vacated and the case set down for trial."); see also Super. Ct. R. Crim. P. 32(e). To withdraw a guilty plea, a defendant must establish either (1) "a fatal defect in the Rule 11 proceeding at which the guilty plea was taken," or (2) "that justice demands withdrawal in the circumstances of the particular case." Springs v. United States, 614 A.2d 1, 3 (D.C. 1992) (citations omitted). Here, the defendant does not allege any defect in the Rule 11 proceedings. He therefore shoulders the heavy burden of establishing that "justice demands" that he be permitted to withdraw his plea.^{13/}

^{13/} Where plea procedures are followed, a motion to withdraw a guilty plea "will justify an evidentiary hearing only in the most extraordinary circumstances." Blackledge v.
(continued...)

“A motion to withdraw a guilty plea made before sentence is regarded more leniently [(than one made after sentence)] and should be given favorable consideration ‘if for any reason the granting of the privilege seems fair and just.’” Kyle v. United States, 759 A.2d 192, 196 (D.C. 2000) (quoting Pierce v. United States, 705 A.2d 1086, 1089 (D.C. 1997), cert. denied, 525 U.S. 1087 (1999)), cert. denied, 531 U.S. 1100 (2001). Still, absent an “error in the taking of the defendant’s plea,” the trial court should be “reluctant” to permit a defendant to withdraw a guilty plea – “even if the defendant makes out a legally cognizable defense to the charges against him.” United States v. Cray, 310 U.S. App. D.C. 329, 334, 47 F.3d 1203, 1208 (1995). “That is, a defendant who fails to show some error under Rule 11 has to shoulder an extremely heavy burden if he is ultimately to prevail.” Id.

“[T]he determination of whether the defendant has met the “fair and just” standard for withdrawing the guilty plea is left to the trial court’s sound discretion. . . . Accordingly, the trial court’s decision on the motion will not be disturbed absent an abuse of discretion.” Binion v. United States, 658 A.2d 187, 191 (D.C.1995) (citations omitted). To ascertain whether it is “fair and just” to withdraw a guilty plea, the trial court should consider: “(1) whether the defendant has asserted his legal innocence; (2) the length of delay between the entry of the plea and the motion to withdraw it; and (3) whether the defendant had the full benefit of competent counsel at all times.” Kyle, 759 A.2d at 200 (citing Pierce, 705 A.2d at 1092); accord Binion, 658 A.2d at 191. None of these factors is controlling; the trial court should consider them cumulatively in the context of the individual case.

¹³/(...continued)

Allison, 431 U.S. 63, 84 (1977) (Powell, J. concurring) (quotation marks omitted).

Id.^{14/} Here, each of these factors weighs heavily against defendant Gaither's asserted desire to withdraw his plea.

B. ANALYSIS

1. Assertion of Legal Innocence

"In seeking to withdraw a guilty plea, a defendant's naked assertion of innocence is insufficient. A defendant must 'set forth some facts, which when accepted as true, make out some legally cognizable defense to the charges, in order to effectively deny culpability.'" Binion, 658 A.2d at 192 (quoting Springs, 614 A.2d at 5 ("A bald assertion of innocence . . . without any grounds in support thereof will not give a defendant the absolute right to withdraw his guilt plea.")) (internal quotation marks and citations omitted)). Indeed, a trial court is "free to discredit a defendant's assertion of innocence when it directly contradicted the defendant's prior sworn statement of culpability." Bennett v. United States, 726 A.2d 156, 168 (D.C. 1999); Binion, 658 A.2d at 193 (where appellant's "sworn admission at the time of the plea" remains "unretracted" and his "factual contentions, when accepted as true, 'make out no legally cognizable defense to the charges, he has not effectively denied culpability, and his withdrawal motion need not be granted'" (quoting United States v. Barker, 168 U.S. App. D.C. 312, 324, 514 F.2d 208, 220 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975))).

^{14/} The fact that the Court accepted the defendant's guilty plea, but deferred decision on whether to accept the Rule 11(e)(1)(c) plea agreement until sentencing, does not alter the principles explained in the text above. See United States v. Hyde, 520 U.S. 670, 671-72, 674 (1997) ("Guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time"; still, a defendant must show a "fair and just" reason to withdraw a guilty plea); accord United States v. Jones, 374 U.S. App. D.C. 144, 148, 472 F.3d 905, 909 (2007).

At the outset, *the defendant has not set forth any claim of legal innocence*. He has not contradicted the government's proffer of evidence or claimed that the admissions he made in the course of pleading guilty are wrong, false, or relieve him of legal culpability. He has not suggested that he was not on the scene of the homicide, or that his role in the homicide was such that he would be relieved of legal responsibility for Ms. Frazier's murder.

To the contrary, in his Motion to Withdraw, *the defendant admits to a set of facts that firmly establish his legal guilt*. In his Motion to Withdraw, the defendant "admit[s] to participating in attempting to temporarily restrain Ms. Frazier, but stated with clarity that when he departed Ms. Frazier's presence she was alive and responsive, demonstrated by the fact that she was coughing and recuperating." Defendant's Motion at 2. These facts, even taken as true, still establish that the defendant - by seizing and restraining Frazier - not only aided and abetting a kidnapping, but committed one by himself. The defendant does not dispute that Frazier was restrained in the small, back bedroom, that she had been bound with tape, that she was placed in a closet, and that she died. As the Redbook Instruction reads:

If two or more people, acting together, are committing or attempting to commit a kidnapping, and one of them, in the course of the felony and in furtherance of the common purpose to commit the felony, kills a human being, both the person who committed the killing and the person or persons who aided and abetted in the felony are guilty of felony murder.

And any person who aids and abets the commission of a kidnapping is guilty of felony murder for a killing that was committed in furtherance of a common purpose to commit that felony or a killing that was, in the ordinary course of things, a natural and probable consequence of acts done in committing that felony.

Redbook Instruction 4.204. Thus, even if the defendant's chokehold restraint did not kill the decedent, and even if the decedent was still alive when he left her in the bedroom, the defendant is guilty of felony murder under at least three theories: a principal, an aider and abettor, and a co-

conspirator.

First, the defendant is guilty of felony murder because, in admitting that he “temporarily restrained” the decedent, he admits that he kidnapped her. Even if one of his co-defendants struck the fatal blow that killed the decedent, that killing was in the course of the kidnapping and in furtherance of the common purpose to commit that kidnapping. Thus, the defendant is still guilty of felony murder as a principal.

Second, the defendant is guilty of felony murder because, in admitting that he temporarily restrained the decedent, he also admits (at minimum) that he aided and abetted the commission of a kidnapping. With a group of people punching, kicking, beating, taping, and choking the decedent, her death was a natural and probable consequence of the acts committing in furtherance of that kidnapping. Accordingly, the defendant is guilty of felony murder under and aiding and abetting theory of liability.

Third, the defendant is guilty of felony murder because he admits that he was a member of a conspiracy to assault and kidnap Frazier. It is undisputed that a member of the conspiracy actually killed Frazier, and that the killing was during the course of the conspiracy. Such a killing was a reasonably foreseeable consequence of the conspiracy to assault and kidnap her. And, as proven by his willingness to dispose of the body in the dumpster, it is clear that the defendant never withdrew from said conspiracy. Accordingly, the defendant is also still guilty under a co-conspirator liability theory.

In sum, although this Court is “free to discredit a defendant’s assertion of innocence when it directly contradicted the defendant’s prior sworn statement of culpability,” in this case, the Court does not have to do so. Even under the version of events now submitted by the defendant,

he is still guilty, in a variety of ways, of the charge to which he pled guilty – first degree felony murder. The defendant has not asserted his actual innocence. Rather, he has further solidified his guilt. There is no fair and just reason to allow the defendant to withdraw his guilty plea where the defendant asserts facts under which he is still guilty of the charge to which he pled. Just as in Binion, the defendant’s “sworn admission at the time of the plea” remains “unretracted” and his “factual contentions, when accepted as true, ‘make out no legally cognizable defense to the charges, [thus] he has not effectively denied culpability, and his withdrawal motion need not be granted.’” Binion, 658 A.2d at 193. For these reasons, the Court should deny the defendant’s Motion to Withdraw.

2. Length of Delay

“Motions to withdraw that are made promptly are ‘regarded with particular favor’ because ‘a swift change of heart is itself a strong indication that the plea was entered in haste and confusion.’” White v. United States, 863 A.2d 839, 842 (D.C. 2004) (quoting Gooding v. United States, 529 A.2d 301, 307 (D.C. 1987)), cert. denied, 547 U.S. 1197 (2006). “The length of time is measured as between the date of the plea and ‘the time the defendant sought to withdraw the plea.’” Id. (quoting Pierce, 705 A.2d at 1094). The length of time here is forty days: the defendant entered his guilty plea on November 20, 2012, and first expressed his desire to withdraw it on December 30, 2012, via his letter to the Court expressing a willingness to go to trial. The defendant’s assertion that he immediately notified the court of his desire to withdraw his guilty plea and the facts related thereto is simply false.^{15/}

^{15/}

The defendant asserts that he attempted to get in touch with the Court and counsel
(continued...)

The defendant's forty-day delay in attempting to withdraw his guilty plea undermines his claim that he entered the plea under any form of duress or confusion. This delay far exceeds lengths that the District of Columbia Court of Appeals ("DCCA") has deemed unfavorable to defendants seeking to withdraw guilty pleas in other cases, even in the absence of prejudice to the government.^{15/} See White, 863 A.2d at 842 (three to four weeks); Bennett, 726 A.2d at 169 (three weeks); Springs, 614 A.2d at 8 (three weeks); Byrd v. United States, 801 A.2d 28, 33 (D.C. 2002) (twenty-six days). Moreover, as illustrated in the plea hearing excerpts cited above, the Court inquired of the defendant at length concerning his decision to plead guilty and gave the defendant multiple opportunities to change his mind. However, the defendant persisted in his decision to plead guilty, demonstrating that it was not the product of haste or compulsion. See Bennett, 726 A.2d 156, 171 n.41 (agreeing with government's assertion that defendant's claim that his plea had been involuntary was in tension with his stipulation that there was no Rule 11 violation; by so admitting, the defendant was acknowledging that the inquiry had ensured that he had waived his constitutional rights voluntarily,

^{15/}(...continued)

to inform them of his desire to take back his plea, but that he could not due to his restrictive detention at the D.C. Jail. First, in a review of the defendant's recorded telephone calls placed from the jail between November 19, 2012 and the date of his letter, he never once mentioned that he made a mistake, that he was confused, that he was coerced, or that he wanted to rescind his plea. To the contrary, as late as December 17, 2012, the defendant was speaking to friends and family about how he was looking forward to moving "to the feds" in North Carolina. Furthermore, there is no evidence in the record to suggest that, after his plea but before December 30, 2012, the defendant tried to write a letter and send it to the Court, but could not. The government would also note that the defendant expressed his desire to proceed to trial the day before this Court surrendered the Felony 1 calendar.

^{16/} The length of delay here, even assuming the government suffered no prejudice, cuts forcefully against the defendant's request to withdraw his guilty plea. The government does not, however, by way of this pleading concede that we have suffered no prejudice from the delay.

knowingly, and intelligently). As such and for these reasons, the Court should deny the defendant's Motion to Withdraw.

3. Competent Counsel

"To benefit by consideration of this factor, '[the defendant] must show that counsel's advice fell short of the range of competence demanded of attorneys in criminal cases and motivated his plea.'" Pierce, 705 A.2d at 1086 (quoting Williams v. United States, 595 A.2d 1003, 1006 (D.C. 1991); see also Hill v. Lockhart, 474 U.S. 52, 57 (1985) (effective assistance of counsel in guilty plea context embraces the same objective standard as in Strickland v. Washington, 466 U.S. 668 (1984)).^{17/}

Here – without question – the defendant had the benefit of highly competent and thorough counsel throughout the proceedings leading to his decision to plead guilty. As the Court repeatedly noted during these proceedings, the Public Defender's Service generally and these counsel specifically provided defendant Gaither with outstanding representation in this case. It was certainly the experience of the government that defense counsel were highly prepared, diligent, and extremely effective in representing their client at all stages of the proceedings, including during plea negotiations.

Additionally, the defendant cannot demonstrate that his defense team was in any way less than effective, and any assertions to the contrary are belied by the record in this case, including the defendant's own statements at the plea hearing. In his Motion to Withdraw, the defendant makes

^{17/} To withdraw a guilty plea on the ground of ineffective assistance of counsel alone, a defendant must also establish "that the deficient performance prejudiced the defense," Strickland, 466 U.S. at 687, *i.e.*, "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

conclusory allegations concerning the failings of his prior counsel, including that he was “unable to communicate with his attorneys” and that, when he told his attorneys he needed more time to discuss the plea, his attorneys “refused to indicate his concerns to the court and told him that he had no option except to resolve the case by plea.” Defendant’s Motion at 6-7. The Court should not credit the defendant’s self-serving and – based on the record – plainly false claims. First, at the plea hearing, the defendant repeatedly stated under oath that he elected to plead guilty because he was in fact guilty and that he had not been threatened or improperly influenced to do so. Second, the defendant was given multiple opportunities to change his mind and to communicate any misgivings he had about pleading guilty during the hearing. He did not. Third, the defendant waited forty days to communicate his desire to withdraw his guilty plea – long after any alleged coercive effect from the circumstances of the plea would have dissipated. Fourth, although the defendant stated at the plea hearing that he felt that even more motions could have been filed on his behalf, he stated he was ultimately satisfied with his counsel’s performance. The defendant was given a repeated and explicit invitation by this Court to air out any problems or difficulties he had with counsel at that time. He did not note that he was having any difficulty in communicating with his attorneys, or that he needed more time and his counsel had instructed him that he must plead guilty. To the contrary, defendant Gaither stated, under oath, that he had had enough time to talk with his attorneys in the case, and that he had had enough time to talk with his attorneys about his decision to plead guilty. And when the Court made it crystal clear to the defendant that he needed to express any reservations, hesitations, or reluctance he had to the Court, the defendant said nothing:

THE COURT: Finally, Mr. Gaither, do you have any questions for the court about anything that has gone on so far? Now, before you answer that, let me say this. **If I accept your plea of guilty,**

it's going to be very, very difficult for you to come back here next week or next month or next year and say, I've changed my mind, I really didn't want to plead guilty. So if there's anything that's not clear to you, anything confusing to you, you need to let me know. If there's any hesitation or reluctance about doing this, you need to let me know now. And if you have any questions for your lawyer, you're free to ask them of him now, before we go forward. Any question for the Court?

DEFENDANT: No.

(Plea Tr. 20-21) (emphasis added). Finally, the record demonstrates that, at least up until December 30, 2012, when the defendant wrote his letter to the Court, the defendant and his counsel had a collaborative relationship – not a hostile one, as his claim would suggest. There is no support in the record for his claim.

Moreover, as the record explicitly shows, prior counsel advocated vigorously for the defendant from start to finish of this case: moving to compel recovery of decedent's body, moving to suppress statements, moving for severance, moving to reconsider the order of trials, moving to suppress evidence and identifications, conducting independent DNA testing, noticing experts, moving *in limine*, and even issuing a subpoena to the Chief of Police. Even if the defendant's counsel delivered difficult news to the defendant concerning the strength of any potential defenses and his prospects for conviction versus acquittal, *i.e.*, even if the defendant's counsel advised him to plead guilty when he might have preferred a trial, that does not render his counsel incompetent; particularly given the strength of the government's proffered evidence, which included the defendant's video and audio-recorded confession. See United States v. Curry, 377 U.S. App. D.C. 478, 484, 494 F.3d 1124, 1130 (2007) (denial of withdrawal motion affirmed where attorney

described defendant's case as "hopeless," when "little chance" may have been a more precise rating; "A lawyer is not required to rate a defendant's trial prospects with the precision of a Las Vegas bookmaker, and cannot be regarded as ineffective merely because a court might marginally disagree with that rating in hindsight.").

In sum, the defendant entered his guilty plea freely and knowingly after consultation with highly competent counsel. The defendant waited forty days to move to withdraw his plea, at great prejudice to the government. The defendant then weakly asserted in his Motion to Withdraw that are flatly contradicted by the record in this case, and that are under circumstances that suggest the defendant's desire to withdraw his plea is part of a larger and continuing effort to manipulate the criminal justice system. And – most notably – the defendant has never asserted his innocence. Indeed, his Motion to Withdraw makes plain that he is clearly and unquestionably guilty of the first degree felony murder of Latisha Frazier.

CONCLUSION

WHEREFORE, the United States of America respectfully requests that the defendant's Motion to Withdraw be denied by this Court.

Respectfully submitted,

RONALD C. MACHEN JR.
United States Attorney.

/s/

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FILED: February 25, 2013

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing pleading was provided via e-mail to counsel for Brian Gaither, Archie Nichols, on February 25, 2013

/s/

Chris Kavanaugh
Assistant United States Attorney

EXHIBIT 1

SUPERIOR COURT
OF THE
DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on October 24, 2011

THE UNITED STATES OF AMERICA	:	Criminal Nos: 2011 CF1 1426
	:	2011 CF1 1948
v.	:	Violations:
	:	
BRIAN GAITHER	:	22 D.C. Code § 2001
ALSO KNOWN AS "B"	:	Kidnapping
PDID: 580-444	:	
	:	22 D.C. Code §§ 2101, 2104;
	:	24 D.C. Code § 403.01 (2001 ed.)
JOHNNIE SWEET	:	First Degree Murder (Felony Murder)
PDID: 582-200	:	(with Aggravating Circumstances)
	:	
	:	22 D.C. Code §§ 2101, 2104;
	:	24 D.C. Code § 403.01 (2001 ed.)
	:	First Degree Murder (Premeditated)
	:	(with Aggravating Circumstances)
	:	
	:	22 D.C. Code § 723 (2001 ed.)
	:	Tampering with Physical Evidence
	:	
	:	22 D.C. Code § 722(a)(6) (2001 ed.)
	:	Obstruction of Justice (Due Administration)
	:	
	:	23 D.C. Code § 1328(a)(1) (2001 ed.)
	:	Offenses Committed During Release
	:	
The Grand Jury charges:	:	

COUNT ONE
(Kidnapping of Latisha Frazier)

On or about August 2, 2010, within the District of Columbia, Brian Gaither, also known as "B," Johnnie Sweet, and persons whose identities are known to the grand jury, seized, confined, kidnapped, abducted, inveigled, and carried away Latisha Frazier with intent to hold and detain Latisha Frazier for the purpose of assaulting her. (Kidnapping, in violation of 22 D.C. Code, Section 2001 (2001 ed.)).

COUNT TWO
(Felony Murder of Latisha Frazier)

Brian Gaither, also known as "B," Johnnie Sweet, and persons whose identities are known to the grand jury, within the District of Columbia, in perpetrating or attempting to perpetrate the crime of kidnapping, killed Latisha Frazier on or about August 2, 2010 (First Degree Murder (Felony Murder), in violation of 22 D.C. Code, Sections 2101, 2104.01 (b)(1), 2104.01(b)(4), 24 D.C. Code, Section 403.01(b-2)(2) (2001 ed.)).

The Grand Jury Further Charges that at the time such murder was committed, the following aggravating circumstance existed: the murder was committed in the course of a kidnapping or an attempted kidnapping.

The Grand Jury Further Charges that at the time such murder was committed, the following aggravating circumstance existed: the murder was especially heinous, atrocious, or cruel.

COUNT THREE
(Premeditated Murder of Latisha Frazier)

Brian Gaither, also known as "B," Johnnie Sweet, and persons whose identities are known to the grand jury, within the District of Columbia, purposely and with deliberate and premeditated malice, killed Latisha Frazier by assaulting her on or about August 2, 2010, thereby causing injuries from which Latisha Frazier died on or about August 2, 2010. (First Degree Murder (Premeditated), in violation of 22 D.C. Code, Sections 2101, 2104.01 (b)(1), 2104.01(b)(4), 24 D.C. Code, Section 403.01(b-2)(2)(2001 ed.)).

The Grand Jury Further Charges that at the time such murder was committed, the following aggravating circumstance existed: the murder was committed in the course of a kidnapping or an attempted kidnapping.

The Grand Jury Further Charges that at the time such murder was committed, the following aggravating circumstance existed: the murder was especially heinous, atrocious, or cruel.

COUNT FOUR
(Tampering with Physical Evidence)

On or about August 3, 2010, within the District of Columbia, Brian Gaither, also known as "B," Johnnie Sweet, and persons whose identities are known to the grand jury, altered, destroyed, mutilated, concealed, and removed an object, that is, Latisha Frazier's body, knowing and having reason to believe that an official proceeding was likely to be instituted, with the intent to impair the integrity and availability of Latisha Frazier's body for evidentiary use in the official proceeding. (Tampering with Physical Evidence, in violation of 22 D.C. Code, Section 723 (2001 ed.)).

COUNT FIVE
(Obstruction of Justice by Brian Gaither)

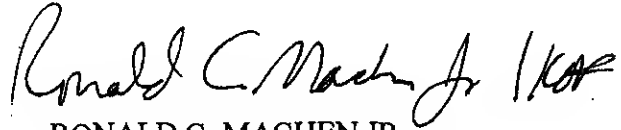
In or about early August 2011, within the District of Columbia, Brian Gaither, also known as "B," corruptly obstructed, impeded, or endeavored to obstruct and impede the due administration of justice in an official proceeding, to wit, the case of United States v. Brian Gaither, 2011 CF1 1426, then pending in the Superior Court of the District of Columbia. (Obstruction of Justice, in violation of 22 D.C. Code, Section 722(a)(6) (2001 ed.)).

COUNT SIX
(Offenses Committed While On Release)

On or about August 2, 2010, within the District of Columbia, Brian Gaither, also known as "B," previously having been released pursuant to the provisions of Title 23 of the District of Columbia Code in Superior Court Case Number 2010CMD12109, committed while so released the crime of kidnapping, a felony, as set forth in the first count of this indictment. (Offenses Committed During Release, in violation of 23 D.C. Code, Section 1328(a)(1)).

COUNT SEVEN
(Offenses Committed While On Release)

On or about August 3, 2010, within the District of Columbia, Brian Gaither, also known as "B," previously having been released pursuant to the provisions of Title 23 of the District of Columbia Code in Superior Court Case Number 2010CMD12109, committed while so released the crime of Tampering with Physical Evidence, a felony, as set forth in the fourth count of this indictment. (Offenses Committed During Release, in violation of 23 D.C. Code, Section 1328(a)(1)).


RONALD C. MACHEN JR.
United States Attorney
in and for the District of Columbia

A TRUE BILL:

Foreperson

EXHIBIT 2

1 SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

2 CRIMINAL DIVISION

3
4 UNITED STATES OF AMERICA,)

5 Plaintiff,)

6 vs.)

2011 CF1 1426

7 BRIAN GAITHER,)

8 Defendant.)

9
10 Washington, D.C.
11 Tuesday,
November 20, 2012

12 The above entitled action came on regularly for
13 entry of plea before the Honorable WILLIAM M. JACKSON,
14 Associate Judge, in courtroom number 302, commencing at
the hour of 10:20 a.m.

15 THIS TRANSCRIPT REPRESENTS THE PRODUCT
16 OF AN OFFICIAL REPORTER, ENGAGED BY THE
17 COURT, WHO HAS PERSONALLY CERTIFIED THAT
IT REPRESENTS TESTIMONY AND PROCEEDINGS
18 OF THE CASE AS REPORTED.

19 APPEARANCES:

20 On Behalf of the Government:

Christopher Kavanaugh and Melinda Williams
Office of the United States Attorney
555 4th Street NW
Washington, D.C. 20530

22 On Behalf of the Defendant:

23 Eugene Ohm and Natalie Lawson
Public Defender Service, District of Columbia
24 633 Indiana Avenue NW
Washington, D.C. 20004
25

1 P R O C E E D I N G S

2
3 THE CLERK: United States versus Brian Gaither,
4 2011 CF1 1426.

5 MS. WILLIAMS: Good morning, Your Honor. Melinda
6 Williams for the United States.

7 THE COURT: Good morning.

8 MR. KAVANAUGH: Chris Kavanaugh for the United
9 States, Your Honor.

10 THE COURT: Good morning.

11 MR. OHM: Eugene Ohm on behalf of Brian Gaither.

12 THE COURT: Good morning.

13 MR. OHM: Ms. Lawson is coming.

14 THE COURT: Is she coming forward?

15 MR. OHM: Yes, Your Honor. She should be here in
16 a second.

17 THE COURT: My understanding of -- Ms. Lawson is
18 before the Court as well.

19 MS. LAWSON: Good morning, Your Honor.

20 THE COURT: Good morning. My understanding is
21 that the parties have reached an agreement in this case. Is
22 that right?

23 MR. OHM: That's correct, Your Honor.

24 MS. WILLIAMS: Yes, Your Honor.

25 THE COURT: I have a document which consists of

1 six pages; the last two pages being a proffer of facts and
2 the defendant's acknowledgement.

3 Place the defendant under oath, please.

4 (Defendant sworn by the Clerk.)

5 THE COURT: While the entire terms of the plea
6 agreement are set forth in the six-page document, a letter
7 from Mr. Kavanaugh and Ms. Williams to Mr. Ohm and Ms.
8 Lawson, but generally, what are the terms of the agreement
9 that have been reached between the Government and Mr.
10 Gaither.

11 MR. OHM: Mr. Gaither agrees to plead guilty to
12 one count of first degree felony murder. The Government
13 will dismiss all the remaining counts in the indictment,
14 including the aggravators for the charge to which he pleads
15 guilty, and will not bring forth any other charges that are
16 associated with his incarceration involved in this case,
17 reserve stepback, waive any or withdraw any enhancement
18 papers that might apply, and reserve its right to
19 allocution. This is an 11(e)(1)(C) plea to a set term of
20 384 months, Your Honor.

21 THE COURT: Mr. Gaither, my understanding of
22 the agreement that's been reached between you and the
23 Government, the only thing that's incorrect here is in the
24 letter it says this is a preindictment plea. It's not.

25 MR. KAVANAUGH: That's correct, Your Honor.

1 MR. OHM: I forgot to mention this to counsel.
2 I think paragraph 6 is also stricken from the letter.

3 MR. KAVANAUGH: Given that it's an 11(e)(1)(C)
4 plea, paragraph 6 wouldn't apply.

5 THE COURT: I see it crossed out on here.

6 MR. OHM: I crossed it out to remind myself to
7 talk to the Government about it.

8 MR. KAVANAUGH: And that's correct, Your Honor,
9 this is a post-indictment plea.

10 THE COURT: All right. If the parties don't mind
11 me just making that correction, from pre to post?

12 MS. WILLIAMS: Yes, Your Honor.

13 THE COURT: Mr. Gaither, my understanding of the
14 agreement that's been reached between you and the Government
15 is that if you enter a plea of guilty in this case to one
16 count of first degree felony murder, the Government will
17 dismiss the remaining charges. That is to say, the
18 Government will dismiss the charge of kidnapping in count 1,
19 they will dismiss the charge of first degree premeditated
20 murder with aggravating circumstances in count 3. They will
21 dismiss the charge of tampering with physical evidence in
22 count 4. They will dismiss the charge of obstruction of
23 justice. They will also not file any enhancement papers.
24 Those are papers for aggravating circumstances or enhancing
25 your sentence because you committed this offense while on

1 release. The Government has also agreed to not bring any
2 other charges related to this incident. They're reserving
3 stepback. That is to say, they're reserving their right to
4 request that I detain you until sentencing. And they're
5 reserving their right to allocute at the time of sentencing.
6 That is to say, they're reserving their right to speak and
7 recommend what type of sentence I should impose in this
8 case.

9 In addition to that, this is what's called an
10 11(e)(1)(C) plea. That is to say, the parties have agreed
11 to the sentence. And if I accept the sentence and the
12 parties have agreed that the Court should impose in this
13 case 384 months, if I accept this plea of guilty, then
14 that's what my sentence will be; 384 months. But I don't
15 know whether I'm going to accept it or not because I don't
16 know that much about you. I need to find out a lot more
17 about you, and I will do that at the time of sentencing.
18 They will prepare a presentence report. Your attorneys will
19 submit letters on your behalf. The Government will submit
20 information, and if I do accept it, then that's the sentence
21 I will impose. If I reject it, you will have a right to
22 withdraw your plea of guilty and go forward.

23 Do you understand?

24 THE DEFENDANT: Yes.

25 THE COURT: Is that your understanding of the

1 agreement that's been reached between you and the Government?

2 THE DEFENDANT: Yes.

3 THE COURT: Other than that agreement, have there
4 been any other agreements or promises that have been made to
5 get you to plead guilty?

6 THE DEFENDANT: No.

7 THE COURT: The maximum sentence, I believe, is a
8 sentence that the Court could impose if the Court rejects
9 the plea is up to, I believe, up to 60 years. Right?

10 MR. KAVANAUGH: That's correct.

11 THE COURT: I'm not saying I'll do that. But
12 that's only if I reject the plea. Now, knowing that, do you
13 still wish to enter a plea of guilty?

14 THE DEFENDANT: Yeah.

15 THE COURT: All right. Mr. Gaither, how old are
16 you?

17 THE DEFENDANT: Twenty-five.

18 THE COURT: What's the highest grade you've
19 attended?

20 THE DEFENDANT: Ninth.

21 THE COURT: Were you born here in D.C.?

22 THE DEFENDANT: Yes.

23 THE COURT: So you're a citizen of the United
24 States?

25 THE DEFENDANT: Yes.

1 THE COURT: In the past 24 hours have you had any
2 drugs?

3 THE DEFENDANT: No.

4 THE COURT: Alcohol?

5 THE DEFENDANT: No.

6 THE COURT: Are you on medication from a doctor?

7 THE DEFENDANT: No.

8 THE COURT: Is there anything else at all that
9 would affect your ability to think clearly and understand
10 what's going on here today?

11 THE DEFENDANT: No.

12 THE COURT: When you enter a plea of guilty, you
13 give up your right to a trial. There is no trial. I'm
14 going to ask the Government to tell me what facts they would
15 be introducing if this case proceeded to trial. I'd like
16 you to listen to what the Government has to say because I'm
17 going to have a few questions for you after they finish.

18 Mr. Kavanaugh, what evidence would the Government
19 introduce at trial if this case had gone to trial?

20 MR. KAVANAUGH: Thank you, Your Honor. I intend
21 to read it verbatim from the proffer of facts, including the
22 plea agreement.

23 THE COURT: All right.

24 MR. KAVANAUGH: Had the case of United States
25 versus Brian Gaither, 2011 CF1 1426, proceeded to trial, the

1 Government would have proven beyond a reasonable doubt,
2 among other things, that on or about August 1, 2010, the
3 defendant, Brian Gaither, was present in an apartment
4 located at 1787 Trenton Place SE, Washington, D.C., when
5 Johnnie Sweets discovered that approximately \$900 which he
6 had stored for safekeeping at that location had been stolen.
7 Johnnie Sweets was furious, and the group, including the
8 defendant, Brian Gaither, Laurence Hassan, Cinthya Proctor
9 and Aneka Nelson discussed who had stolen the money. The
10 group, including the defendant, suspected that Latisha
11 Frazier was responsible. The group, including the
12 defendant, was angry at Frazier for having stolen the money.

13 After a discussion the group, including the
14 defendant, decided and agreed to invite Frazier over to 1787
15 Trenton Place SE, and when she arrived they planned to go to
16 the back bedroom, where the females would beat her to teach
17 her a lesson for having stolen the money.

18 The next day, on or about August 2, 2010, the
19 group, including the defendant, met at 1787 Trenton Place
20 SE. Because the group believed that Frazier had a crush on
21 Sweets' older brother, the older brother called Frazier and
22 invited her over. When Frazier arrived, she was walked to a
23 small bedroom in the apartment, where multiple individuals,
24 including the defendant Gaither, were waiting to assault
25 Frazier. Consistent with their plan, once Frazier arrived

1 in the bedroom, the three females, Proctor, Nelson and Lane
2 Bell, proceeded to jump Frazier, hitting and kicking her.
3 Sweets then began to attack Frazier, punching, kicking and
4 stomping her. Defendant Gaither joined in and proceeded to
5 punch, kick and stomp the decedent as she lay on the floor.
6 While Gaither and Sweets beat Frazier, Frazier was bleeding,
7 crying, screaming, pleading for them to stop.

8 Gaither and Sweets left his bedroom and went to
9 the living room living, leaving Frazier, who was suffering
10 from her injuries, alone. After the initial attack, the
11 group decided to bind Frazier. Gaither and others used tape
12 to bind Frazier's feet and arms. A cloth was taped over
13 Frazier's mouth so she could not scream. After she was
14 bound, defendant Gaither and Sweets put her in a closet and
15 shut the door. When Gaither and Sweets put her in the
16 closet, she was still crying. In the living room the group
17 discussed what they would do next. The defendant and others
18 heard moaning coming from the closet. Gaither went to the
19 back bedroom, wrapped his arms around Frazier's neck, and
20 choked her using a technique he described as the L sleeper
21 hold. Gaither then put Frazier back inside the closet.

22 Later that day someone checked on Frazier in the
23 closet and reported to the rest of the group that Frazier
24 was dead. The group went back into the bedroom and verified
25 that Frazier was no longer alive. The group discussed what

1 to do with Frazier's body.

2 The next day, August 3, 2010, Frazier's body
3 remained in the bedroom closet until Gaither, Sweets and
4 Proctor carried the body from the bedroom to the bathroom,
5 placing it in the bathtub for the purpose of dismembering
6 it. Using a large kitchen knife, Proctor and Sweets tried
7 to cut through Frazier's arm near the shoulder, but the
8 knife was not sufficiently sharp to complete the dismember-
9 ment, and both complained of the smell. After these
10 attempts Proctor, who was pregnant, became physically ill
11 and Hassan accompanied her to the hospital, leaving
12 defendant Gaither with Frazier's body.

13 Defendant Gaither enlisted the assistance of an
14 associate to dispose of the body. Defendant Gaither placed
15 the body inside of a plastic container. Gaither and his
16 associate then dragged the container to a dumpster behind
17 1787 Trenton Place SE.

18 In entering this plea of guilty, defendant Gaither
19 admits these facts freely and voluntarily, without duress or
20 coercion.

21 THE COURT: All right. Mr. Gaither, did you hear
22 what the Government had to say?

23 THE DEFENDANT: Yes.

24 THE COURT: Is what the Government said true?

25 THE DEFENDANT: Yes.

1 THE COURT: I have here, on page 2 of the proffer
2 of facts, it says here defendant's acknowledgement. And it
3 says here, I have read and discussed the Government's proffer
4 of facts that we just talked about with my attorney, Eugene
5 Ohm, Esquire. I agree and acknowledge by my signature that
6 this proffer of facts is true and correct. And there it has
7 your name there, Brian Gaither.

8 Is that your signature right above that?

9 THE DEFENDANT: Yes.

10 THE COURT: Did you go through this with your
11 attorney before you signed it?

12 THE DEFENDANT: Yes.

13 THE COURT: Was he able to answer any questions
14 you might have had about it?

15 THE DEFENDANT: Yes.

16 THE COURT: As I said before, when you enter a
17 plea of guilty, Mr. Gaither, you give up your right to
18 trial. And I'm sure your lawyers have discussed with you
19 the rights you have when you go to trial. I'm going to go
20 through those rights with you again so that I can be
21 satisfied that you understand those rights and the rights
22 that you give up by entering a plea of guilty.

23 First of all, understand that you do not have to
24 plead guilty. You have a right to a trial on these charges.

25 Do you understand?

1 THE DEFENDANT: Yes.

2 THE COURT: The trial that I'm talking about is a
3 jury trial. It's a trial where 12 citizens of the District
4 of Columbia would be listening to all the evidence, and I
5 would be instructing them on the law that applies to the
6 evidence.

7 Do you understand that?

8 THE DEFENDANT: Yes.

9 THE COURT: At that trial you are presumed
10 innocent, and the Government bears the burden of proving you
11 guilty of the charges beyond a reasonable doubt.

12 Do you understand?

13 THE DEFENDANT: Yes.

14 THE COURT: At that trial you would have the
15 right to and the assistance of a lawyer. And, just as your
16 lawyers are representing you here today, they would be
17 representing you before, during and after the trial. And
18 you've seen a lot of that. Already they've been filing
19 motions, making objections. They would be asking questions
20 of the Government witnesses. It would all be work and
21 effort on behalf of you in an effort to show the Court or
22 the jury that you are not guilty or that the Government
23 cannot prove you guilty of the charges beyond a reasonable
24 doubt.

25 Do you understand?

1 THE DEFENDANT: Yes.

2 THE COURT: Now, at that trial you do not have to
3 put on any evidence. Even if you decided that you did not
4 want to put on any evidence, the Government still must prove
5 you guilty of the charges beyond a reasonable doubt.

6 Do you understand?

7 THE DEFENDANT: Yes.

8 THE COURT: Now, of course, if you wanted to put
9 on some evidence, you would have a right to do that as well.
10 If, for example, there were witnesses out there that had
11 information that was favorable to you, information that
12 would show the jury and the Court that you're not guilty,
13 your attorneys could subpoena those witnesses, and we could
14 force those witnesses to come to court and testify.

15 Do you understand?

16 THE DEFENDANT: Yes.

17 THE COURT: There's another right you have when
18 you go to trial. It's a right that you give up when you
19 enter a plea of guilty. And that's called the right to
20 remain silent. What that means is that at the trial you do
21 not have to testify. No one could force you to get on the
22 stand and say anything. That's because you have an absolute
23 right under the Constitution not to testify, if that's your
24 decision. And if you decided at your trial that you didn't
25 want to testify, I would instruct the jury and tell them

1 they could not hold your decision against you. That is to
2 say, they could not assume you were guilty or think you were
3 guilty or draw any inference of guilt merely because you
4 exercised your right not to testify.

5 Do you understand?

6 THE DEFENDANT: Yes.

7 THE COURT: Now, of course, if you wanted to
8 testify ----

9 I'm sorry. Any time you want to talk to him, just
10 say, Judge, I want to talk to ----

11 THE DEFENDANT: I apologize.

12 THE COURT: It's not a problem. If you want to
13 say something to him, go ahead.

14 MR. OHM: Yes, Your Honor.

15 (Discussion off the record.)

16 THE COURT: Of course, if you wanted to testify at
17 your trial, you would have a right to do that as well.
18 Stated another way, no one could make you testify if you did
19 not want to, and no one could prevent you from testifying if
20 you wanted to.

21 Do you understand?

22 THE DEFENDANT: Yes.

23 THE COURT: Understand that when you enter a plea
24 of guilty you give up all those rights; you give up your
25 right to a trial.

1 Do you understand?

2 THE DEFENDANT: Yes.

3 THE COURT: Finally, there's another right that
4 you have when you go to trial, and that's a right that you
5 give up when you enter a plea of guilty. And that's called
6 the right of appeal. What that means is this: If you went
7 to trial and lost, that is to say, you were found guilty,
8 you would have a right to appeal that decision to a higher
9 court. In this case, it's the Court of Appeals. What the
10 judges on the Court of Appeals would do is they would look
11 at the way I conducted your trial, they would look at the
12 decisions I made during the course of your trial, and if
13 they concluded that I made errors or mistakes that affected
14 your rights, they could reverse my decision and order that
15 you be given a new trial.

16 Now, understand that when you enter a plea of
17 guilty, you not only give up your right to a trial, but you
18 also give up your right to appeal.

19 Do you understand?

20 THE DEFENDANT: Yes.

21 THE COURT: If I accept your plea of guilty, the
22 only thing that's going to be left for me to do is sentence
23 you. Now, you could always appeal it if I were to impose an
24 illegal sentence. But other than that, there will be no
25 appeal.

1 Do you understand?

2 THE DEFENDANT: Yes.

3 THE COURT: Has anyone threatened, forced you,
4 coerced you or made you enter a plea of guilty in this case?

5 THE DEFENDANT: No.

6 THE COURT: I take it then you are entering this
7 plea of guilty because in fact you are guilty and you've
8 thought about it, talked it over with your lawyers, and
9 decided this is something that you want to do. Is that
10 right?

11 THE DEFENDANT: No.

12 THE COURT: You don't want to plead guilty?

13 THE DEFENDANT: I mean yeah, but I'm just asking
14 a question.

15 THE COURT: As I said, I take it you're entering
16 a plea of guilty because in fact you are guilty. Is that
17 right?

18 THE DEFENDANT: Yeah. Yes.

19 THE COURT: Have you had enough time to talk about
20 this case with your lawyer?

21 THE DEFENDANT: Yes.

22 THE COURT: Have you had enough time to talk about
23 your decision to enter a plea of guilty today with your
24 lawyer?

25 THE DEFENDANT: Yes.

1 THE COURT: Are you satisfied with your lawyers
2 and what they've done for you?

3 THE DEFENDANT: No.

4 THE COURT: You're not satisfied with your
5 lawyers?

6 THE DEFENDANT: No.

7 THE COURT: What is it that you're not satisfied
8 with?

9 THE DEFENDANT: In the beginning it was things
10 could have been done, but it wasn't. I feel like it was
11 unfair to me. You know, evaluations, other motions that
12 could have been filed way before. It was just -- that's
13 where I'm at.

14 THE COURT: All right. We need to set this down
15 for trial because he doesn't want to ----

16 MR. OHM: I don't think that's what Mr. Gaither
17 was saying. But if I could have the Court's indulgence for
18 a moment.

19 THE COURT: Sure.

20 Mr. Ohm, do you want to talk to him in the back?

21 (Defendant and counsel leave the courtroom,
22 and discussions were had off the record.)

23 MR. OHM: Your Honor, we're ready to proceed.

24 THE COURT: Mr. Gaither, I asked if you were
25 satisfied with the services of your attorney, and your

1 answer was no. And I really want to explore that. You said
2 that you wanted more, that certain motions should have been
3 filed earlier and the like, and evaluations. And I really
4 want to understand that. I know we took a break, and you
5 had an opportunity to speak to your lawyers in the back.
6 So that's where I'm at. I'm trying to find out if you're
7 satisfied with your lawyers and what they've done.

8 THE DEFENDANT: Yes.

9 THE COURT: Well, I just really want to -- I can't
10 hear you. I'm sorry.

11 THE DEFENDANT: Yes.

12 THE COURT: Is there something that you're
13 dissatisfied with them about?

14 THE DEFENDANT: Except for what I told you.

15 THE COURT: Okay. Well, I'm trying to -- I don't
16 know where that leaves us, Mr. Gaither. There have been a
17 ton of motions that have been filed in this particular case
18 on your behalf by your lawyers. Is there some other motion
19 that you believe should have been filed that they haven't
20 filed?

21 THE DEFENDANT: I'm not sure, but I know there
22 could have been.

23 THE COURT: I'm trying to figure out what motion
24 you believe should have been filed.

25 THE DEFENDANT: I don't know.

1 THE COURT: Pardon?
2 THE DEFENDANT: I don't know the law.
3 THE COURT: Mr. Ohm?
4 MR. OHM: Your Honor, we're satisfied. I think
5 that perhaps if the Court reframed the same question with
6 presently satisfied with our advice, that that would get us
7 over this hump.
8 THE COURT: I don't want this to come back later
9 on.
10 MR. KAVANAUGH: Your Honor, what the Government
11 would ask is that, obviously with the plea of guilty, Mr.
12 Gaither gives up the right to appeal, and also to assert a
13 defense, those defenses including the insanity defense. So
14 we were going to ask for a separate inquiry with respect to
15 that, just as simple as that. And after that I believe the
16 Government will be satisfied if we ask Mr. Gaither if he's
17 presently satisfied with his counsel.
18 THE COURT: Are you presently satisfied with your
19 counsel?
20 THE DEFENDANT: Yes.
21 THE COURT: And the advice that they've given you?
22 THE DEFENDANT: Yes.
23 THE COURT: And the work that they've done?
24 THE DEFENDANT: Yes.
25 THE COURT: I have another document here that says

1 plea agreement and waiver of trial. It's United States
2 versus Brian Gaither. And it's signed by the Assistant
3 United States Attorney, it's signed by your attorney, and
4 then it has what appears to be your signature on this form.

5 THE DEFENDANT: Yes.

6 THE COURT: Did you go through this form with your
7 lawyers before you signed it?

8 THE DEFENDANT: Yes.

9 THE COURT: You understand that by placing your
10 signature on this form you're acknowledging what we've been
11 talking about so far; that is, by entering a plea of guilty,
12 you're giving up your right to a trial.

13 Do you understand?

14 THE DEFENDANT: Yes.

15 THE COURT: All right. I'll approve the waiver.

16 Finally, Mr. Gaither, do you have any questions
17 for the Court about anything that's gone on so far?

18 Now, before you answer that, let me say this. If
19 I accept your plea of guilty, it's going to be very, very
20 difficult for you to come back here next week or next month
21 or next year and say, I've changed my mind, I really didn't
22 want to plead guilty. So if there's anything that's not
23 clear to you, anything confusing to you, you need to let me
24 know. If there's any hesitation or reluctance about doing
25 this, you need to let me know now. And if you have any

1 questions for your lawyer, you're free to ask them of him
2 now, before we go forward.

3 Any questions for the Court?

4 THE DEFENDANT: No.

5 THE COURT: All right. What additional?

6 MR. KAVANAUGH: Your Honor, I think the record is
7 clear that there are no competency issues and that there's
8 no substantial question as to his sanity. Nevertheless,
9 given some of the recent litigation, the Government would
10 just ask one last question; if Mr. Gaither understands that
11 with this plea of guilty he gives up, that he's waiving, his
12 right to assert any sort of insanity defense.

13 THE COURT: Okay. Mr. Gaither, do you understand
14 that by entering this plea of guilty you're waiving any
15 right to assert an insanity defense?

16 THE DEFENDANT: Yes.

17 THE COURT: You understand what an insanity
18 defense is. Right?

19 THE DEFENDANT: Can I talk to my lawyer?

20 THE COURT: Sure.

21 (Discussion off the record.)

22 THE COURT: Do you understand what an insanity
23 defense is?

24 THE DEFENDANT: Yes.

25 THE COURT: Do you understand that if an insanity

1 defense was raised in this particular case, the Government
2 first would have to prove you guilty beyond a reasonable
3 doubt. After that, your lawyers would have the burden of
4 proving by a preponderance of the evidence that at the time
5 of this incident you were not criminally responsible; that
6 is to say, that at the time of this offense you were
7 mentally ill and that, as a result of your mental illness,
8 you were not responsible for the acts for which you were
9 found guilty.

10 Do you understand that?

11 THE DEFENDANT: Yes.

12 THE COURT: Now, knowing that, do you still not
13 wish to raise an insanity defense in this case?

14 MR. OHM: Your Honor, I'd actually ask the Court
15 not to phrase it in that term.

16 THE COURT: Okay. Do you still wish to waive any
17 right to have an insanity defense in this case?

18 THE DEFENDANT: Yes.

19 THE COURT: Very well. Are there any other
20 questions?

21 MR. KAVANAUGH: None from the Government, Your
22 Honor.

23 THE COURT: Okay. Are counsel satisfied that
24 there's a factual basis for the plea?

25 MR. OHM: Yes, Your Honor.

1 MR. KAVANAUGH: Yes, Your Honor.
2 THE COURT: Very well.
3 Then, Mr. Gaither, to the charge of first degree
4 felony murder, how do you plead; guilty or not guilty?
5 THE DEFENDANT: Guilty.
6 THE COURT: The Court, having inquired of Mr.
7 Gaither, finds he's aware of his rights, that he has
8 knowingly, intelligently and voluntarily waived his rights.
9 The Court further finds that there's a factual basis for
10 this plea. I will accept the plea at this time, again,
11 conditionally, pursuant to rule 11(e)(1)(C).
12 We need to set a date for sentencing. About eight
13 weeks, I guess.
14 MR. OHM: Your Honor, can we go with the first
15 week of February, Your Honor?
16 MR. KAVANAUGH: February 1st works for the
17 Government, Your Honor.
18 THE COURT: That's fine.
19 All right. Anything further at this point?
20 MR. OHM: No, Your Honor.
21 MR. KAVANAUGH: No, Your Honor.
22 THE COURT: Does the Government intend to continue
23 the sentencings ----
24 MR. KAVANAUGH: May I confer with their counsel,
25 Your Honor?

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THE COURT: Okay. Because Sweets is still pending.

MR. KAVANAUGH: Correct. I need to confer with their counsel. I apologize, Your Honor.

THE COURT: All right.

MR. KAVANAUGH: Thank you.

MS. WILLIAMS: Have a nice holiday.

THE COURT: Okay. You, too.

(Proceedings concluded at 11:00 a.m.)

1 CERTIFICATE OF REPORTER

2
3
4 I, SUSAN G. WALKER, an Official Court Reporter
5 in and for the Superior Court of the District of Columbia,
6 hereby certify that at said time and place I reported in
7 my official capacity by means of machine shorthand all
8 testimony adduced and other oral proceedings had in the
9 matter of UNITED STATES vs. BRIAN GAITHER, case number
10 2011 CF1 1426, in said court on the 20th day of November,
11 2012.

12 I further certify that the foregoing pages, 1
13 through 24, constitute the official transcript of said
14 proceedings, as taken from my shorthand notes, and that
15 it is a correct and accurate record of said proceedings.

16 WITNESS my hand at Washington, D.C., this 9th
17 day of January, 2013.
18
19
20

21 s/ **SUSAN GLENN WALKER**

22 SUSAN GLENN WALKER, RPR, FCRR
23 Official Court Reporter
24
25

EXHIBIT 3



U.S. Department of Justice
United States Attorney
Ronald C. Machen
District of Columbia

Judiciary Center
555 Fourth St. N.W.
Washington, D.C. 20001

November 19, 2012

Eugene Ohm, Esq.
Natalie Lawson, Esq.
Public Defender Service
633 Indiana Avenue NW
Washington, D.C. 20004
Counsel for Brian Gaither

Re: United States v. Brian Gaither, Case No. 2011 CF1 1426

Mr. Ohm and Ms. Lawson:

post w.t.

I am writing to provide you with a ~~pre~~-Indictment plea offer to resolve your client's pending case. This plea offer will expire at 5:00 p.m. on November 20, 2012. The government reserves the right to revoke this plea offer at any time before your client enters a guilty plea in this case, however. If your client accepts the terms and conditions set forth below, please have your client execute this document in the space provided below and return the executed documents no later than the above date and time. Upon receipt of the executed documents, this letter will become the plea agreement between your client and the Office of the United States Attorney for the District of Columbia. The terms of the offer are as follows:

Your client is currently charged in a seven-count indictment for his involvement in the death of Latisha Frazier. Specifically, your client is charged with:

- | | |
|---------------------|--|
| Count One: | Kidnapping,
a violation of 22 D.C. Code § 2001 |
| Count Two: | First Degree Felony Murder with Aggravating Circumstances,
a violation of 22 D.C. Code §§ 2101, 2104 |
| Count Three: | First Degree Premeditated Murder with Aggravating Circumstances,
a violation of 22 D.C. Code §§ 2101, 2104 |
| Count Four: | Tampering with Physical Evidence,
a violation of 22 D.C. Code §§ 723 |
| Count Five: | Obstruction of Justice,
a violation of 22 D.C. Code §§ 722 |
| Count Six: | Offenses Committed During Release,
a violation of 23 D.C. Code, Section 1328(a)(1) |
| Count Seven: | Offenses Committed During Release,
a violation of 23 D.C. Code, Section 1328(a)(1). |



If your client pleads guilty to one count of First Degree Felony Murder, in violation of 22 D.C. Code, Section 2101, the government will:

- Dismiss all remaining charges of the indictment, including the aggravating circumstances for the charge to which your client pleads guilty.
 - reserve its right to allocute as to whether your client should incarcerated pending sentencing;
 - waive or withdraw all enhancement papers that apply;
 - reserve its right to allocute at the time of sentencing pursuant to the agreement detailed in paragraph 1, below.
1. Your client and the Government agree that a sentence within a range of 384 months' incarceration is the appropriate sentence in this case. Your client and the Government agree, pursuant to Rule 11(e)(1)(C) of the Superior Court Rules of Criminal Procedure, to present this plea agreement to the Court for its approval. If the Court accepts the plea agreement and the specific range agreed upon by the parties, that is, 384 months' incarceration, then the Court will embody in the judgment and sentence the disposition provided for in this plea agreement, pursuant to Rule 11(e)(3) of the Superior Court Rules of Criminal Procedure. The parties understand, however, that in light of other factors the Court may not agree that such a sentence is an appropriate one and may reject the plea agreement pursuant to Rule 11(e)(4) of the Superior Court Rules of Criminal Procedure. Upon such a rejection, pursuant to Rule 11(e)(4), neither party would then be bound by this plea agreement. Your client understands that if this happens, the Court, in accordance with the requirements of Rule 11(e)(4), will inform the parties of its rejection of the plea agreement, and will afford your client an opportunity to withdraw the plea, or if your client persists in the guilty plea will inform your client that a final disposition may be less favorable to your client than that contemplated by this agreement.
 2. Your client understands that the offense of First Degree Felony Murder carries a potential maximum penalty of life imprisonment, but, given the agreement, your client would face only a maximum of thirty-two years' (or 384 months) incarceration.
 3. Your client understands that the Court may utilize the District of Columbia Sentencing Commission's Voluntary Sentencing Guidelines in imposing the sentence in this case. The government and your client agree that neither party will seek an upward or downward departure outside of your client's applicable guideline range, which will be determined by the Court at the time of sentencing.
 4. The parties further agree that your client, after taking an oath to tell the truth, shall agree to a detailed factual proffer or an insulating statement in open court on the date of the plea.
 5. Your client also agrees that if any firearms or illegal contraband were seized by any law enforcement agency from the possession of or the direct or indirect control of

your client, then your client consents to the administrative forfeiture, official use and/or destruction of said firearms or contraband by any law enforcement agency involved in the seizure of those items.

6. Your client agrees that this letter is binding on the government, but not binding on the court, and that your client cannot withdraw this plea at a later date, because of the harshness of any sentence imposed by the court. The government understands that your client is not bound by the government's allocution, and may request a lesser sentence within or below your client's applicable guideline range.
7. The charge to which your client would be entering a guilty plea is a crime of violence as defined in D.C. Code Section 23-1331(4). Your client has already exercised his rights to have DNA testing conducted in this case on the biological material recovered, therefore, you client need not waive any rights under the IPA.
8. In entering this plea of guilty, your client understands and agrees to waive certain rights afforded to your client by the Constitution of the United States and/or by statute. In particular, your client knowingly and voluntarily waives or gives up his right against self-incrimination with respect to the offense(s) to which your client is pleading guilty before the Court which accepts your client's plea. Your client also understands that by pleading guilty, your client is waiving or giving up your client's right to be tried by a jury or by a judge sitting without a jury, the right to be assisted by an attorney at trial, and the right to confront and cross-examine witnesses.

This letter sets forth the entire understanding between the parties and constitutes the complete plea agreement between your client and the Office of the United States Attorney for the District of Columbia. This agreement supersedes all prior understandings, promises, agreements, or conditions, if any, between this office and your client.

THIS PLEA OFFER EXPIRES ON NOVEMBER 20, 2012 AT 5:00 P.M. Importantly, the government reserves the right to withdraw this plea offer at any time prior to acceptance of the plea by the Court.

Sincerely,

RONALD C. MACHEN JR.
United States Attorney

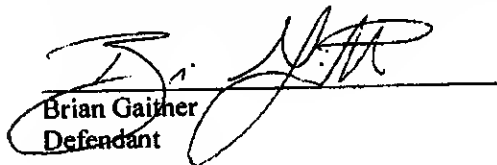
By:


CHRISTOPHER R. KAVANAUGH
MELINDA WILLIAMS
Assistant United States Attorneys

DEFENDANT'S ACCEPTANCE

I have read this plea agreement and attached factual proffer and have discussed it with my attorney, Eugene Ohm. I fully understand this agreement and agree to it without reservation. I do this voluntarily and of my own free will, intending to be legally bound. No threats have been made to me, nor am I under the influence of anything that could impede my ability to understand this agreement fully. I am pleading guilty because I am in fact guilty of the offenses set forth herein.

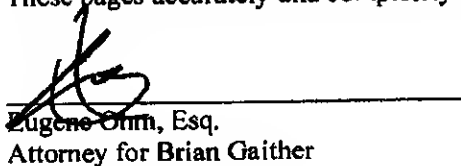
I reaffirm that absolutely no promises, agreements, understandings, or conditions have been made or entered into in connection with my decision to plead guilty except those set forth in this plea agreement. I am satisfied with the legal services provided by my attorney in connection with this plea agreement and matters related to it.


Brian Gaither
Defendant

11/19/12
Date

ATTORNEY'S ACKNOWLEDGMENT

I have read each of the four pages constituting this plea agreement, reviewed them with my client, Brian Gaither, and discussed the provisions of the agreement with my client, fully. These pages accurately and completely set forth the entire plea agreement.


Eugene Ohm, Esq.
Attorney for Brian Gaither

11/19/12
Date

EXHIBIT 4

Superior Court of the District of Columbia

United States of America/
District of Columbia

vs.

Case No. 2011 CF1 1426

Brian Gaither

PLEA AGREEMENT AND WAIVER OF TRIAL

PLEA AGREEMENT: Defendant and the Government enter into the following plea agreement: The defendant enters a plea of guilty to one count of first degree felony murder. The government to dismiss the greater and remaining charges. The government reserves stepback, waives and withdraws enhancement papers, reserves allocution. This plea is entered into by the parties pursuant to Rule 11(c)(1)(c) to a sentence of 32 years. (See attached)

the sentence
life

YOU ARE NOT REQUIRED TO PLEAD GUILTY. If you do plead guilty, you will give up important rights, some of which are stated below.

life

First, you give up your right to trial by the court or by a jury, comprised of 12 members of the community. At a trial you would be presumed to be innocent, and the Government would be required to present evidence in open court, to prove its case beyond a reasonable doubt.

32 years

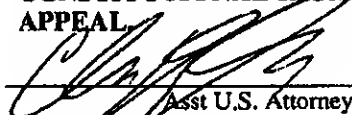
At the trial you have the right to have a lawyer represent you. The lawyer would be able to cross-examine witnesses, file motions to suppress evidence and statements, and make objections and arguments on your behalf. You would have the right to question any witness, and you could have witnesses come to court and testify for you. You would also have the right to testify if you wanted to; however, if you chose not present testimony that decision could not be held against you. You could not be convicted at trial unless the court found that the Government had proved your guilt beyond a reasonable doubt.

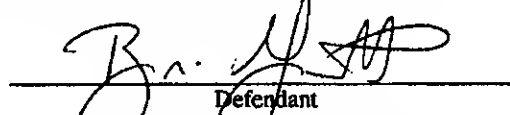
Second, you have the right to appeal your conviction to the Court of Appeals. This is a right you would have if you were convicted after trial. The right to appeal includes the right to have the Court of Appeals appoint a lawyer for you and pay for your lawyer's services if you could not afford a lawyer.

Third, if you are not a citizen of the United States, your plea of guilty could result in your deportation, exclusion from admission to the United States, or denial of naturalization.

Your signature on this form means that you wish to plead guilty and give up your right to trial and your right to appeal. If the court accepts your guilty plea, you will be convicted and the only matter left in the case will be for the court to sentence you. No person can guarantee what your sentence will be.

I HAVE REVIEWED THIS FORM WITH MY LAWYER AND HAVE DECIDED TO PLEAD GUILTY IN THIS CASE. I HAVE DECIDED TO GIVE UP MY CONSTITUTIONAL RIGHT TO HAVE A TRIAL AND TO GIVE UP MY RIGHT TO APPEAL.


Asst U.S. Attorney


Defendant

Approved this 20th day November 2012


Attorney for Defendant


Judge



EXHIBIT 5

PROFFER OF FACTS

Had the case of United States v. Brian Gaither, 2011 CF1 1426, proceeded to trial, the government would have proven beyond a reasonable doubt, among other things, that:

On or about August 1, 2010, the defendant Brian Gaither was present in an apartment located at 1787 Trenton Place S.E., Washington, D.C., when Johnnie Sweet discovered that approximately \$900 dollars, which he had stored for safekeeping at that location, had been stolen. Johnnie Sweet was furious, and the group (including defendant Brian Gaither, Laurence Hassan, Cinthya Proctor, and Aneka Nelson) discussed who had stolen the money. The group, including the defendant, suspected that Latisha Frazier was responsible. The group, including the defendant, was angry at Frazier for having stolen the money. After a discussion, the group, including the defendant, decided and agreed to invite Frazier over to 1787 Trenton Place S.E., and when she arrived, they planned to go to the back bedroom where the females would beat her to "teach her a lesson" for having stolen the money.

The next day, on or about August 2, 2010, the group (including the defendant) met at 1787 Trenton Place S.E. Because the group believed that Frazier had a crush on Sweet's older brother, the older brother called Frazier and invited her over. When Frazier arrived, she was walked to a small bedroom of the apartment, where multiple individuals – including defendant Gaither – were waiting to physically assault Frazier. Consistent with their plan, once Frazier arrived in the bedroom, the three females – Proctor, Nelson, and Lane Bell – proceeded to "jump" Frazier, hitting and kicking her. Sweet then began to attack Frazier, punching, kicking, and stomping her. Defendant Gaither joined, and proceeded to punch, kick, and stomp the decedent as she lay on the floor. While Gaither and Sweet beat Frazier, Frazier was bleeding, crying, and screaming, pleading for them to stop. Gaither, and Sweet left his bedroom and went to the living room, leaving Frazier who was suffering from her injuries alone.

After the initial attack, the group decided to bind Frazier. Gaither and others used tape to bind Frazier's feet and arms. A cloth was taped over Frazier's mouth so she could not scream. After she was bound, defendant Gaither and Sweet put her in the closet and shut the door. When Gaither and Sweet put Frazier in the closet, she was still crying.

In the living room, the group discussed what they would do next. The defendant (and others) heard moaning coming from the closet. Gaither went to the back bedroom, wrapped his arms around Frazier's neck and choked her using a technique he later described as an "L" sleeper hold. Gaither then put Frazier back inside the closet.

Later that day, someone checked on Frazier in the closet and reported to the rest of the group that Frazier was dead. The group went back into the bedroom and verified that Frazier

was no longer alive. At this point, the group, including Gaither, discussed what to do with Frazier's body.

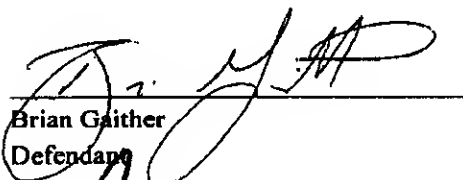
The next day, August 3, 2010, Frazier's body remained in the bedroom closet until Gaither, Sweet, and Proctor carried the body from the bedroom to the bathroom, placing it in the bathtub for the purpose of dismembering it. Using a large kitchen knife, Proctor and Sweet both tried to cut through Frazier's arm near the shoulder, but the knife was not sufficiently sharp to complete the dismemberment and both complained of the smell. After these attempts, Proctor, who was pregnant, became physically ill and Hassan accompanied her to the hospital, leaving defendant Gaither with Frazier's body.

Defendant Gaither enlisted the assistance of an associate to dispose of the body. Defendant Gaither placed Frazier's body inside of a plastic container. Gaither and his associate then dragged the container to a dumpster behind 1787 Trenton Place, S.E.

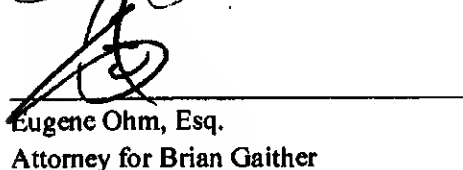
In entering this plea of guilty, defendant Brian Gaither admits these facts freely and voluntarily, without duress or coercion.

DEFENDANT'S ACKNOWLEDGMENT

I have read and discussed the government's Proffer of Facts with my attorney, Eugene Ohm, Esquire. I agree, and acknowledge by my signature, that this Proffer of Facts is true and correct.


Brian Gaither
Defendant

11/19/12
Date


Eugene Ohm, Esq.
Attorney for Brian Gaither

11/19/12
Date